

THE MULTISTATE TAX COMMISSION'S ALTERNATIVE DISPUTE RESOLUTION PROGRAM:

HISTORY AND OVERVIEW

A. *Initiation and Development of the MTC ADR Program.*

At the invitation of Tim Leathers, then MTC Chair, James Eads, Senior Attorney for AT&T, introduced the Executive Committee of the Multistate Tax Commission to the concept of alternative dispute resolution (“ADR”) through a July, 1994 presentation. The Executive Committee soon thereafter established an ADR Subcommittee to review the issue. That Subcommittee, staffed by Alan Friedman, MTC General Counsel, was initially comprised of:

Tim Leathers, Director of the Arkansas Department of Finance and Administration, and (then) Chair, Multistate Tax Commission

Ernie Dronenburg (Member, California Board of Equalization)

David Levine (California State Board of Equalization)

Ben Miller (California Franchise Tax Board)

John LaFaver (Kansas Secretary of Revenue)

Clark Snelson (Utah Attorney General's Office)

Additional state representatives soon joined the MTC ADR Subcommittee and became active in the development of the Program. They were: John Theis (Arkansas Revenue Division), Jesse Weaver (Michigan Bureau of Revenue), Terese Koenig (Minnesota Department of Revenue), Dave Metzler (Missouri Department of Revenue), Frank Katz (New Mexico Taxation and Finance Department), and Val Oveson (Chair, Utah State Tax Commission).

The Committee on State Taxation (“COST”) expressed strong interest in participating in the development of an ADR Program dealing with state taxation and created its own ADR Subcommittee to work with the MTC ADR

Subcommittee on the substance and details of the Program. COST's Subcommittee was comprised of the following persons:

J. William McArthur, Jr. (President and Executive Director of COST)

Scott B. Clark (Corporate Tax Department, GTE Corporation)

James Eads (Senior Attorney for AT&T)

John M. Neberle (Assistant General Counsel, Ford Motor Co.)

William D. Peltz (Senior Tax Counsel, Shell Oil Co.)

Kenneth C. Stewart, Jr. (Director, State and Local Taxes, Georgia-Pacific Corporation)

Frank A. Yanover (Director, State and Local Taxes, Nabisco)

The COST ADR Subcommittee was extremely helpful in delineating the issues to be addressed in the program development phase and substantially contributed to the effort to create the MTC ADR Program.

By resolution adopted on July 28, 1995, the Multistate Tax Commission authorized the implementation of the Commission's Alternative Dispute Resolution Program ("MTC ADR Program"). In adopting new Bylaw 14 to the Multistate Tax Commission Bylaws, the Commission recognized that:

the public interest would be served by making available to certain taxpayers an opportunity for voluntary ADR processes to resolve their tax disputes with states in a manner that would (1) expedite the tax collection and refund processes; (2) reduce costs to both taxpayers and states; (3) promote uniformity in the application of state tax laws that should be uniformly interpreted and applied to those taxpayers conducting business across state and national borders; or (4) avoid protracted, unpredictable and costly litigation...

On November 9, 1995, the Commission began to create the infrastructure of the MTC ADR Program. On that date, the Executive Committee adopted a “Statement of Specific Procedures for Initiation and Conduct of Multistate Tax Commission Alternative Dispute Resolution Processes” and established the composition and mission of the Special Alternative Dispute Resolution Advisory Committee to the MTC Executive Director. (That Committee, to be comprised of both state and private-sector representatives, will be appointed in the near future).

As noted earlier, the creation of the MTC ADR Program and the development of the Statement of Specific Procedures were the product of a cooperative effort by representatives of the Commission and the Committee on State Taxation (“COST”). Although there were differing views on the potential scope of issues covered by the MTC ADR Program as it is now being implemented, these representatives worked in full cooperation with one another to create dispute resolution options for tax administrators and taxpayers.¹ They shared the goal of providing States and multistate taxpayers with alternative methods for resolving tax disputes that were more cost-efficient and less time-consuming than those methods associated with the traditional formal administrative and judicial approaches. The creation of the MTC ADR Program represents a major advancement towards achieving that goal.

B. *State Tax Matters to Which the MTC ADR Program Potentially Applies.*

¹ Three differing viewpoints were expressed regarding the scope of the Program. One view (supported by the COST ADR Subcommittee) was that the Program should be made available in any and all circumstances in which a tax dispute arose between even a single state and a taxpayer (“the single state approach”). A second view would have limited the Program to those tax disputes having a multistate character where at least one state agreed to address the issue by ADR, even if the other involved state(s) did not so agree (the “multistate issue approach”). The third view—the one currently being followed by the MTC Executive Committee—limits the use of the MTC ADR Program to those tax disputes in which two or more states agree to address the issue through ADR (the “two states at the table approach”).

The MTC ADR Program applies to “state tax matters in which a taxpayer is affected by a transactional, operational, centrally-assessed property, or other tax matter in which a taxpayer and two or more states voluntarily agree to participate.” Thus, the Program is wide open to any type of tax issue so long as the taxpayer and two or more States *voluntarily* agree to meet at the table. Additionally, two or more States may utilize the MTC ADR Program to address matters among themselves, without the necessity of a taxpayer being made a party.

The types of tax matters that would be particularly amenable to settlement under the MTC ADR Program would involve two or more states attributing the same income or the same sales transaction to more than one State for apportionment or other tax purposes. More specifically, taxpayers and their representatives have long complained about circumstances in which two States were sourcing the same receipt to their respective sales factor numerators for income or franchise tax purposes. Taxpayers may also face two or more States treating the same source of income differently —the first State viewing the income-producing activity as creating business income, the second one viewing the same activity as creating non-business income. In such a circumstance, duplicative taxation may result if the second State were the state of commercial domicile. In the transactional tax area, on occasion two or more States may view the same transaction as being subject to taxation under their respective sales and use tax laws, thus creating multiple taxation of the same transaction. These examples illustrate the types of tax matters which could be addressed more readily through voluntary ADR than through traditional tax appeals methods.

C. *Types of ADR Processes Available under the MTC ADR Program.*

The two basic types of ADR processes available under the MTC ADR Program are mediation and arbitration. Mediation is a process in which a “third party neutral” assists the parties in reaching a mutually acceptable settlement of the issues. In a mediation, the neutral does not have any authority to enter any decision on the merits of the issues in dispute. In contrast, arbitration is a process in which the parties present their cases to one or more third party neutrals who then enter a decision on the merits. At the sole election of the parties, the arbitrated decision may be binding or non-binding. Variations to these basic two processes (arbitration-mediation and mediation-arbitration) also may be agreed upon and these processes are described in the “Statement of Specific Procedures” (MTCADR Form 100, ¶¶ III.B and C).

D. *Qualified List of Third-Party Neutrals.*

The Executive Director is authorized to certify a list of qualified persons to act as third-party neutrals for matters subject to the MTC ADR Program. This list will be developed and maintained to assure the parties that qualified neutrals will be available to devote the proper type of attention required to both the substantive and process types of issues required to resolve multistate tax issues. (See “Qualifications for Mediators [Arbitrators] of the MTC Sponsored ADR Process Involving Multistate Tax Disputes” adopted by the MTC Executive Committee in January, 1996. See also, “Statement of Specific Procedures,” MTCADR Form 100, ¶IV., for details regarding the selection process and conflict of interest provisions).

E. *Outline of MTC the ADR Program Process.*

1. **Initiation of Process.** The two or more States and, if applicable, the taxpayer execute a written agreement and provide written notice to the Executive Director of the MTC setting forth the voluntary agreement to submit issues to an ADR process. (See MTCADR Forms [#s, forthcoming]). The notice will contain certain information, such as the identity of the parties (the taxpayer may, at its option, remain anonymous to the MTC); the type of ADR process unanimously agreed upon; a description of the issues; the number of neutrals to be selected; information regarding waiver or extension of statute of limitation requirements; information about other interested States, etc. (See “Statement of Specific Procedures,” MTCADR Form 100, ¶ II.B.)

The parties may either unanimously agree on the third party neutral(s) to be selected from the MTC qualified list, or, if this is not possible, may each select one neutral. These neutrals will, in turn, select any remaining neutrals needed to satisfy the total number previously agreed upon by the parties.

2. **Procedures to Be Followed by Third-Party Neutrals.**

While there are certain basic procedures that most mediators follow in conducting a mediation, the mediator must be capable of adapting to the particular circumstance he or she faces and be aware of a broad variety of strategies that may be brought into play. While the parties control the identification of issues submitted to mediation and the type of resolution to be agreed upon, the neutral must protect the integrity of the mediation process. Therefore, with the exception of a few basic procedures, the Statement of Specific Procedures permits the mediator great flexibility in the type of process details to be applied. (See “Statement of Specific Procedures,” MTCADR Form 100, ¶V.A.)

The arbitration process is somewhat more formalized than mediation. However, the arbitrator retains broad discretion regarding what discovery will be permitted, the admissibility of evidence and many other details of conducting the arbitration. (See “Statement of Specific Procedures,” MTC ADR Form 100, ¶V.B.)

3. ***Privacy and Confidentiality of MTC ADR Process.***

No persons other than the parties, their representatives and those unanimously permitted by the parties and neutral(s) may attend an ADR session. Even MTC personnel are excluded, unless otherwise allowed by the parties. In addition, the persons attending the ADR session are required to sign a confidentiality form (MTCADR Form [#, forthcoming]) that prohibits any non-agreed-upon disclosure of:

- A. views expressed or suggestions made by a party with respect to possible settlement of the dispute;
- B. admissions made by any party in the course of the ADR proceedings;
- C. statements made or views expressed by any witness, mediator(s) or arbitrator(s) or other person privy to the ADR process; or
- D. the fact that another party had or had not indicated a willingness to accept a proposal for settlement.

F. ***Fees and Expenses.***

Each party’s expenses will be borne by the party. Unless otherwise agreed by all of the parties, the fees and expenses of the neutrals will be borne one-half by the taxpayer and one-half by the State or States involved. (See MTCADR Form [#, forthcoming])

G. ***Post - ADR Session Review.***

All of the parties, as well as the third party neutral(s), are required to submit a written evaluation of the ADR process at its termination. (The parties' evaluations will be on an anonymous basis). The evaluations will be reviewed by the MTC in order to make whatever modifications to the Program may be necessary to improve its effectiveness. (See MTCADR Forms [#s forthcoming]).

H. ***Individual State Alternative Dispute Resolution Programs***

Individual States may, of course, establish their own alternative dispute resolution programs to address cases other than those involving two or more States. They are free to use or adapt the MTC procedures for their individual programs. To further assist the States that wish to establish programs for this additional range of cases, the MTC will maintain a voluntary registry of mediators and arbitrators available for such cases. The MTC will not review or certify the qualifications of persons listed on the voluntary registry.

I. ***Conclusion***

The Multistate Tax Commission's Alternative Dispute Resolution Program is a "work in progress" that can best be improved with the information gained from concrete experience in its use. Active utilization by both States and taxpayers will help to achieve all four of the stated purposes of the Multistate Tax Compact:

- Facilitat[ing] proper determination of State and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.
- Promot[ing] uniformity or compatibility in significant components of tax systems.
- Facilitat[ing] taxpayer convenience. . . in tax administration.

- Avoid[ing] duplicative taxation.

The Commission and its member States are committed to fulfilling these goals through the ADR program and hope that taxpayers will give active consideration to using it when multistate tax disputes arise. The Commission will welcome receiving comments and suggestions for improving the program at any time.

In conclusion, the Multistate Tax Commission again expresses its sincere appreciation to the Committee on State Taxation for its active and constructive participation in the development of the Alternative Dispute Resolution Program.